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April 14, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
12th Street Lobby, TW-A325
Washington, DC 20554

Re: Ex Parte Presentation in WT Docket No. 99-217 and CC Docket No. 96-98

Dear Ms. Salas:

On behalf of the Smart Buildings Policy Project,[1] Professor Viet Dinh of Georgetown University Law Center, Jonathan Askin of the Association for Local Telecommunications Services, Philip Verveer of this firm and myself met yesterday afternoon with Christopher Wright, David Horowitz, Joel Kaufman, and Jonathan Nuechterlein of the FCC's Office of General Counsel to discuss the legal issues concerning the provision of nondiscriminatory telecommunications carrier access to multi-tenant buildings.

We explained that the issues of constitutional takings does not operate as a bar to the Commission's actions and, indeed, the actions contemplated in the *Competitive Networks* rulemaking may not even constitute a taking of private property. We also explained why the D.C. Circuit's *Bell Atlantic v. FCC* decision does not apply to the actions considered in the above-referenced dockets. In addition, we discussed the effect of the recent Eleventh Circuit *Gulf Power* decision on the Commission's authority to take action pursuant to Section 224 of the Communications Act, and the more general authority of the FCC to accomplish nondiscriminatory access. I attach hereto a copy of the written testimony provided by Professor Dinh to the House Subcommittee on the Constitution as a summary of the substantive issues discussed during the course of our meeting.

In addition to those issues discussed in Professor Dinh's testimony, we discussed the authority of the FCC to accomplish the objectives of the *Competitive Networks* rulemaking. The substance of the discussion is largely explained in the Comments of Teligent, Inc. filed in the above-referenced dockets. As a brief summary, when read together, Sections 1 and 2(a) of the Communications Act give the FCC jurisdiction to enforce the Act with respect to "all interstate and foreign communication by wire or radio." The definition of "wire communication" includes "all instrumentalities, facilities, apparatus, and services . .

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[1] The members of the growing Smart Building Policy Project currently include the American Electronics Association, the Association for Local Telecommunications Services, AT&T Corp., the Competition Policy Institute, the Information Technology Association of America, the International Communications Association, MCI WorldCom, NEXTLINK Communications, Teligent, Inc., Winstar Communications, Inc., and the Wireless Communications Association.

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. incidental to [the] transmission [of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection...]" 47 U.S.C. § 153(51). The telephone unit as well as the local loop have both been deemed an instrumentality or facility of wire communication. One can reasonably infer, then, that the portions of the network between CPE (the telephone itself) and local loops also constitute an instrumentality of wire communication. The FCC unquestionably has subject matter jurisdiction over the use of such in-building facilities for the provision of interstate wire and radio communications.

The Commission has jurisdiction over all persons engaged in interstate wire or radio communication in the United States. 47 U.S.C. § 152(a). To the extent that building owners exert control over access to and/or charge for telecommunications carrier access to the intra-building communications network, they become persons engaged in interstate wire communication (as that term is literally defined in the Act), and bring themselves within the jurisdiction of the FCC. Moreover, because their actions affect the rates and terms for interstate services offered to consumers by communications common carriers, the FCC retains authority to regulate those actions.

The FCC's authority exists over interstate wire and radio communication and persons engaged in such communication unless the Communications Act otherwise limits this authority. Section 4(i) authorizes the FCC to "perform any and all acts . . . not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). As the Commission properly explained in *Nationwide Wireless Network Corp.*, 9 FCC Rcd 3635, para. 32, "Section 4(i) empowers the Commission to deal with the unforeseen--even if that means straying a little way beyond the apparent boundaries of the Act-- to the extent necessary to regulate effectively those matters already within the boundaries. If an action taken by the agency does not contravene another provision of the Act, it may be justified under Section 4(i) if the Commission "could reasonably conclude that [the action] was necessary and proper to the effectuation" of its functions." (citations omitted.)

One of the FCC's obligations under the Act is to ensure that "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate radio and wire] communication service, shall be just and reasonable." 47 U.S.C. § 201(b).[2] The record in the FCC's *Competitive Networks* rulemaking demonstrates that unreasonable restrictions on telecommunications carrier access to tenants in multi-tenant environments either prohibits altogether the practice of providing interstate radio and wire communication or imposes such onerous costs necessitating an unreasonable increase in the charges therefor in conflict with the goals of the Act. In order to maintain just and reasonable rates for interstate communication by wire and radio, the FCC possesses the authority to ensure that the component inputs of such communication -- inputs such as the rates for and requirements by which carriers obtain access to consumers in multi-tenant environments -- remain reasonable. In this manner, Section 4(i) authorizes the FCC's exercise of jurisdiction to accomplish the goals of the Act (and, specifically, those outlined in the *Competitive Networks* rulemaking).

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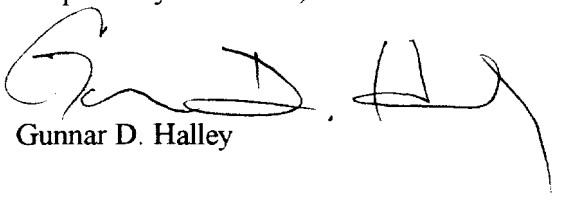
2 The Act goes on to explain that "[c]harges or services, whenever referred to in this Act, include charges for, *or services in connection with*, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind." 47 U.S.C. § 202(b) (emphasis added).

Because these topics concern a pending rulemaking at the Commission, in accordance with the Commission's rules, for each of the above-mentioned proceedings, I hereby submit to the Secretary of the Commission two copies of this notice of the Smart Building Policy Project's ex parte presentation as well as two copies of Professor Dinh's earlier-referenced written testimony.

Respectfully submitted,



Gunnar D. Halley

Enclosure

cc: Christopher Wright
David Horowitz
Joel Kaufman
Jonathan Nuechterlein

SUMMARY OF WRITTEN TESTIMONY OF

VIET DINH
ASSOCIATE PROFESSOR OF LAW
GEORGETOWN UNIVERSITY LAW CENTER

BEFORE THE HOUSE SUBCOMMITTEE ON
THE CONSTITUTION

MARCH 21, 2000

The nondiscriminatory access proposals in the FCC's *Competitive Networks* rulemaking are constitutionally sound and the FCC possesses the statutory authority to promulgate them.

Whether a nondiscriminatory access requirement constitutes a per se taking under the Supreme Court's *Loretto* doctrine has not been addressed directly by the Supreme Court or any lower courts. A requirement that a building owner open its property for any and all telecommunications carriers to install equipment would operate as a per se taking under Supreme Court precedent. But this is not what the FCC proposes to do. Rather, the FCC proposes to impose a requirement that building owners treat telecommunications carriers in a nondiscriminatory manner -- providing new entrant access pursuant to rates and conditions similar to those imposed on the incumbent. This requirement is substantively different for purposes of legal analysis. The FCC's proposal is analogous to the nondiscrimination requirement of Title VII of the Civil Rights Act of 1964 which the Supreme Court held not to constitute a taking of property.

Nondiscrimination is but a governmental condition on a property owner's decision to provide some carriers access to the property. Even where such a condition would work a permanent physical intrusion, the condition would constitute a taking only if there is not a sufficient nexus to the government's authority to regulate the underlying action. The FCC's nondiscrimination condition bears a sufficient nexus to the FCC's authority to regulate property owners' provision of access to telecommunications carriers and the nondiscrimination is proportional to the impact of the building owners perpetuating local telecommunications monopolies through discriminatory access.

However, it is not necessary to determine whether a nondiscrimination requirement operates as a taking. Regardless of whether the requirements operate as a taking or not, the FCC's proposals are constitutionally sound because the FCC may ensure that a reasonable, certain, and adequate provision for obtaining compensation exists for any taking of the landlord's property. The just compensation requirements of the Fifth Amendment are satisfied.

The FCC possesses the authority to require nondiscriminatory access whether or not such a requirement constitutes a taking, even under the D.C. Circuit's analysis in ***Bell Atlantic v. FCC***. The FCC is contemplating regulations that would ensure property owners receive just compensation for any physical occupation of their property. The Commission has the authority to require new entrants into a building to pay just compensation to property owners. A court reviewing the FCC's actions should grant *Chevron* deference to the agency's interpretation of its authority under the statute.

WRITTEN TESTIMONY OF

VIET DINH
ASSOCIATE PROFESSOR OF LAW
GEORGETOWN UNIVERSITY LAW CENTER

BEFORE THE HOUSE SUBCOMMITTEE ON THE CONSTITUTION

MARCH 21, 2000

Mr. Chairman and Members of the Subcommittee,

Thank you very much for this opportunity to comment on the constitutional issues raised by the pending FCC Notice of Proposed Rulemaking on nondiscriminatory telecommunications access to multi-tenant environments. I note that there are several bills pending in Congress that seek to ensure the same result as the proposals under consideration by the FCC.

I am an Associate Professor of Law at the Georgetown University Law Center where I specialize in constitutional law, among other things. Prior to joining the faculty, I was a law clerk to Justice Sandra Day O'Connor on the U.S. Supreme Court, and to Judge Laurence Silberman on the Court of Appeals for the D. C. Circuit. I am currently writing JUDICIAL AUTHORITY AND SEPARATION OF POWERS; A REFERENCE GUIDE TO THE U.S. CONSTITUTION, to by published by Greenwood Press.

Although I appear on behalf of the Smart Building Policy Project,[1] I am here as an analyst and not an advocate. My analysis, therefore, is not necessarily the position of the Project or any of its members; rather, it is simply how I see the constitutional issues in this matter.

The takings issue posed by this hearing's inquiry concerning the FCC's Notice consists of two principal questions: (1) whether a nondiscriminatory access requirement constitutes a taking of private property for public use without just compensation in violation of the Fifth Amendment; and (2) even if such a requirement is constitutionally sound, whether the FCC has authority to promulgate the proposed rules. I will address each question in turn. For the

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[1] The members of the growing Smart Building Policy Project currently include the American Electronics Association, the Association for Local Telecommunications Services, AT&T Corp., the Competition Policy Institute, the Information Technology Association of America, the International Communications Association, MCI WorldCom, NEXTLINK Communications, Teligent, Inc., Winstar Communications, Inc., and the Wireless Communications Association.

reasons detailed below, I conclude that the nondiscriminatory access proposals are constitutionally sound and that the FCC has the statutory authority to promulgate them.

I. The Constitutionality of a Nondiscriminatory Access Requirement

The Fifth Amendment to the Constitution guarantees that private property shall not "be taken for public use, without just compensation." U.S. CONST. amend. V. The proper analysis of the proposed FCC action, accordingly, has two component steps: (A) whether a nondiscriminatory access requirement constitutes a taking of private property; and (B) if it is a taking of property, whether the property owners would not receive just compensation. Only if both inquiries yield affirmative answers would there be a violation of the Fifth Amendment.

A. Taking.

The Supreme Court has established two tests to determine whether a government action constitutes a taking. A permanent physical occupation of private property is a taking per se, *see, e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); the only question is whether there would be adequate compensation. By contrast, other government regulations not involving a permanent physical occupation, such as conditions on the use of private property, are takings only if they fail the multifactor balancing test applicable to regulatory takings. *See, e.g.*, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124-25 (1978).

Whether a nondiscriminatory access requirement constitutes a permanent physical occupation that is a per se taking under *Loretto* is a close question, one that the Supreme Court has not directly addressed. Nor has my research revealed any holding or discussion in lower court opinions directly on point.

Unlike the proposed nondiscriminatory access requirement, if the FCC were to require building owners to open up their property for any and all telecommunications companies to install their equipment, such a requirement would constitute a per se taking. That much is evident from the facts of *Loretto* itself, and it matters not that the intrusion is minimal—that the ceded area is no "bigger than a breadbox." *Loretto*, 458 U.S. at 438 n.16. In that regard, I think the Court of Appeals for the Eleventh Circuit correctly held in *Gulf Power Co. v. United States*, 187 F.3d 1324, 1328 (11th Cir. 1999), that the mandatory access provision of 47 U.S.C. § 224 is a per se taking. (The court further held that the taking is constitutional because there are adequate procedures for just compensation, a subject to which I return below in Part B.)

A nondiscriminatory access requirement of the type proposed by the FCC, however, is substantively different. Instead of mandating that a property owner open his property to outsiders, a nondiscrimination provision simply requires that, should the owner open his property to any outsider, he must also entertain others. The proposal, therefore, is analogous to the nondiscrimination requirement of Title VII of the Civil Rights Act of 1964, which the Supreme Court held not to constitute a taking of property in *Heart of Atlanta Motel, Inc. v.*

United States, 379 U.S. 241, 261 (1964). *Heart of Atlanta Motel*, of course, is not directly apposite because Title VII requires general access to places of public accommodation only, and the FCC proposal would provide limited access to property retained for private use. This distinction, however, turns on the public purpose of the government action. With respect to whether the action constitutes a taking, however, it seems to me that the two nondiscriminatory access requirements are quite analogous.

So viewed, nondiscrimination is but a governmental condition on a property owner's decision to provide some carriers access to his property. Even where such a condition would work a permanent physical intrusion, the condition would constitute a taking only if there is not a sufficient nexus to the government's authority to regulate the underlying action. Thus, in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Commission conditioned the grant of a building permit upon provision of a permanent easement to provide access to public beaches. The Court held that a permanent access easement is a permanent physical occupation under *Loretto*, *see id.* at 831-32; however, that holding did not end the analysis. The easement requirement constituted a taking only because, as a condition, it did not bear a sufficient nexus to the government's reason for regulating the construction of the residential home. *See id.* at 836-37. The Court later explained that a sufficient nexus exists if there is a "rough proportionality" between the "nature and extent" of the condition and the "impact" of the underlying activity. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). Following these guidelines, numerous courts have upheld permanent access easements as reasonable conditions. *See, e.g.*, *Curtis v. Town of South Thomaston*, 708 A.2d 657, 659-60 (Me. 1998) (upholding a fire safety regulation that conditioned approval of a subdivision plan upon the developer building a fire pond and granting the town an easement to maintain and use the pond); *Grogan v. Zoning Board of Town of East Hampton*, 633 N.Y.S.2d 809, 810 (App. Div. 1995) (upholding zoning board's decision to condition grant of permit to build addition onto house upon owner's granting scenic and conservation easement), *appeal dismissed*, 670 N.E.2d 228 (N.Y. 1996); *Sparks v. Douglas County*, 904 P.2d 738, 745-46 (Wash. 1995) (en banc) (upholding planning commission's decision to condition approval of short plat applications upon dedication of rights of way for road improvement). Just so with the FCC's proposed nondiscriminatory access requirement. Such a nondiscrimination condition bears a sufficient nexus to the FCC's authority to regulate property owners' provision of access to telecommunication carriers; the nondiscrimination condition is proportional to the impact of the landowners' actions, that is perpetuating local telecom monopolies through discriminatory access.

Another analogous line of cases is the rule in antitrust law that a dominant market participant must provide competitors access to essential facilities it owns. *See, e.g.*, *MCI v. AT&T*, 708 F.2d 1081, 1132-34 (7th Cir. 1983). Despite calls from commentators,[2] my research has uncovered no case holding that such a requirement constitutes a per se taking

[2] *See* Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 STAN. L. REV. 1187, 1227-40 (1999) (arguing that if a court were to treat Microsoft's operating system software as an essential facility and were to require Microsoft to include Netscape's internet browser in that operating system, the government would have taken Microsoft's property, under the per se rule in *Loretto*, and would be required to pay just compensation).

under *Loretto*. In *Consolidated Gas Co. of Florida v. City Gas Co. of Florida*, 912 F.2d 1262 (11th Cir. 1990) (per curiam), *vacated as moot*, 499 U.S. 915 (1991), the Eleventh Circuit, sitting en banc, affirmed a district court decision that invoked the essential facilities rationale and ordered the respondent to sell wholesale gas to the petitioner at reasonable prices—over the objections of two dissenting judges that such relief raised Fifth Amendment concerns, *see id.* at 1312-20, and specifically that it would work a per se taking under *Loretto*. *See id.* at 1315 n.52.

In sum, whether a nondiscriminatory access requirement is a per se taking is an open question. Any unqualified answer in the affirmative is in error because it gives conclusive weight to *Loretto* and ignores the competing principles set forth in cases like *Heart of Atlanta Motel* and *Nollan*. I do not venture a conclusion here because the question requires resolving the conflict between two competing lines of cases, both of which are jurisprudentially sensible and legally valid—a task of line drawing that ultimately rests with the Supreme Court. In any event, such a speculation is not necessary to my ultimate conclusion that the FCC proposals are constitutionally sound.

If a nondiscrimination access requirement does not work a per se taking, the proposed FCC action is likely to be upheld as a permissible regulation of the use of private property under the "ad hoc, factual inquiries" into the factors summarized in *Penn Central*: the character of the government action, the economic impact of that action, and its interference, if any, with investment-backed expectations. *See* 438 U.S. at 124. First, the proposed regulations are designed to further the public interest, as defined by Congress, "to foster competition in local telecommunication markets." Notice of Proposed Rulemaking, ¶ 1 (released July 7, 1999); *see* 47 U.S.C. § 251. The Court "has often upheld substantial regulation of an owners' use of his own property where deemed necessary to promote the public interest." *Loretto*, 458 U.S. at 426. Second, the economic impact of the proposed regulations is minimal, at most. Property owners will be directly compensated for the use of property they own and control and indirectly compensated, through rents, for the use of property they own but is controlled by a communications carrier. Third, any expectations backed by the owners' investments are in the use of their property as real estate. These expectations are minimal, if not nil, with respect to ducts and roof space dedicated to utility equipment. Any fortuitous opportunity they now have to participate in the telecommunications business (either as competitors or as lessors of facilities) results from the deregulatory program that the FCC has pursued following a congressional directive. In any event, any investment-backed expectations the owners may have in telecommunications are limited because the owners are operating in a field (telecommunications and/or transacting with communications carriers) that is heavily regulated by the federal government. Such regulations are constantly in flux, rendering unreasonable any assumption or expectation that a nondiscriminatory access requirement or other regulation on the use of their property would not be imposed in the future.

B. Compensation.

Even if, *arguendo*, the proposed FCC regulations constitute a taking, the analysis does not end. "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). "If the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claims against the government for a taking." *Id.* at 195. According to the Notice of Proposed Rulemaking, the FCC contemplates two primary avenues for effecting nondiscriminatory access to multi-tenant environments for communications carriers. First, the FCC may require incumbent local exchange carriers to provide competitors with access, at just, reasonable, and nondiscriminatory rates, to the conduits and rights of way that they control (through leaseholds or other access arrangements) in the buildings. *See* Notice of Proposed Rulemaking, ¶¶ 36, 48. Second, the FCC may require building owners to provide competitive local exchange carriers equal access, at nondiscriminatory rates, to their property for the purpose of installing transmission equipment to service tenants. *See id.* ¶ 60. Under either avenue, the FCC may ensure "that a reasonable, certain, and adequate provision for obtaining compensation exist[s] at the time of the taking." *Wiilliamson County*, 473 U.S. at 194.

First, should the FCC require incumbent carriers to provide access to the conduits and rights of way that they control, 47 U.S.C. § 224(e) permits the carriers to assess charges for such access. The statute sets forth a clear formula for the carrier to recover costs of providing access, through an allocation of the costs of providing both usable and unusable space in the conduits and rights of way. The provision further requires the FCC to promulgate regulations to govern the access charges should "the parties fail to resolve a dispute over such charges." *Id.* § 224(e)(1). "Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments." *Id.*

This statutory procedure guarantees the incumbent carrier ample opportunities to obtain just compensation for providing access. In the first instance, it may levy compensatory charges according to the prescribed cost allocation formula. Should there be a dispute as to such charges, it may negotiate at arms length with the competitive carrier to set appropriate rates. Finally, should the dispute not be resolved, the FCC, after appropriate complaints and proceedings, may determine rates that are "just, reasonable, and nondiscriminatory" pursuant to duly promulgated regulations. On its face, therefore, the statute satisfies the just compensation requirement of the Fifth Amendment. I suppose that there is a possibility that a particular agency determination of a "just, reasonable, and nondiscriminatory" rate would not provide, in the final analysis, "just compensation" under the Fifth Amendment. Such risk, however, inheres in every governmental action, and the remote possibility does not render the FCC proposal facially unconstitutional. *See Gulf Power*, 187 F.3d at 1337-38. In any event, the FCC's rate determination, like other agency actions, is subject to judicial review; the incumbent carrier, therefore, is afforded full protection against the risk of such administrative error. *See id.* at 1338.

Second, with respect to access to areas owned and controlled solely by property owners, the FCC proposes that the owners be paid "nondiscriminatory" rates for such access. The Commission is currently seeking comments on how such rates should be determined, so the precise parameters of such compensation are not fixed. I note, however, that the Commission proposes that property owners be permitted "to obtain from a new entrant the same compensation it has voluntarily agreed to accept from an incumbent LEC." Notice of Proposed Rulemaking, ¶ 60. Such reliance on the arms-length bargain struck with incumbent carriers seems to me a reasonable approximation of the fair market value of access and thus would provide just compensation for any taking of property. To the extent that changed circumstances or different market conditions may render such original compensation an unreliable indicator of fair value, the Commission has also sought comments on how to tailor any nondiscriminatory access requirement to ensure consumer choice "without infringing on the rights of property owners." *Id.* ¶ 55. Thus, at this point, there is little reason to suspect that the procedures for setting nondiscriminatory access charges would not ensure a fair, certain and adequate process for property owners to obtain just compensation for any taking of their property.

II. The Commission's Authority to Promulgate the Proposed Rules

The nondiscriminatory access proposals by the FCC also raise certain separation of powers considerations concerning the Commission's authority to promulgate the proposed regulations. For reasons outlined below, I conclude that the Commission would likely be found to have such authority.

As an initial matter, there is little question that, shorn of the Fifth Amendment implications of the proposed requirements, the Commission has authority to regulate access to multi-tenant environments for the provision of telecommunications services. With respect to facilities controlled by incumbent carriers, 47 U.S.C. § 224 explicitly authorizes the Commission to require that a utility provide access to any "duct, conduit, or right-of-way owned or controlled by it," *id.* § 224(f)(1), and the statute defines utility to include communications carriers. *See id.* § 224(a)(1). With respect to property owned and controlled by the building owners, 47 U.S.C. §§ 151, 152 grant the Commission authority to regulate the transmission of interstate wire or radio communication. The definition of wire communication includes "all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission" and thus contemplates property used for the purpose of providing interstate communication services. *Id.* § 153(52). And 47 U.S.C. §§ 151, 152 further grant the Commission authority to regulate persons engaged in interstate wire communication, as that term is defined above. Building owners, accordingly, are persons engaged in interstate wire communication by virtue of their control or denial of access to the facilities incidental to the transmission of such communication. Finally, the Commission has authority under 47 U.S.C. § 154(i) to "make such rules and regulations, ... not inconsistent with this chapter, as may be necessary in the execution of its functions" and under 47 U.S.C. § 303(r) to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter." Although the authority under the provisions is frequently termed "ancillary jurisdiction" in the telecommunications

parlance, it is more aptly analogized to a general necessary and proper authority to effectuate the purposes and provisions of the statute. *See* PETER HUBER, ET AL., FEDERAL TELECOMMUNICATIONS LAW § 3.3.1, at 221 (2d ed. 1999).

The analysis into agency authority, however, is further complicated by the presence of Fifth Amendment considerations as outlined above. In *Bell Atlantic Telephone Co. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994), the D.C. Circuit reviewed orders of the Commission that required carriers to set aside a portion of their central offices for use by their competitors—known as the physical co-location orders. The petitioners challenged the Commission's authority to promulgate the regulations. The court recognized that it would normally defer to the Commission's statutory interpretation under the principles announced in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), but held that it would not do so in this case because the Commission's interpretation raised substantial constitutional questions regarding executive encroachment on Congress' exclusive powers to appropriate funds. *See Bell Atlantic*, 24 F.3d at 1445. Specifically, the court found that the FCC's orders amounted to a forced access requirement, and thus in all cases "will necessarily constitute a taking" under *Loretto*. *See id.* at 1445-46 (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 n.5 (1985)). To avoid this perceived constitutional difficulty, the court held that the Commission's authority to order physical co-location must either be found in express statutory language or must be a necessary implication from that language, such that "the grant [of authority] itself would be defeated unless [takings] power were implied." *Id.* at 1446 (quoting *Western Union Tel. Co. v. Pennsylvania R.R.*, 120 F. 362, 373 (C.C.W.D.Pa. 1903), *aff'd*, 195 U.S. 540 (1904)) (alterations in original). Finding this "strict test of statutory authority made necessary by the constitutional implications of the Commission's action" not satisfied, the court held that the Commission lacked authority to issue the physical co-location orders. *Id.* at 1447.

Upon closer analysis, however, the holding of *Bell Atlantic* does not apply to the nondiscriminatory access requirements proposed by the FCC. First, the regulation of areas controlled by a communications carrier follow from the express authorization to order a physical taking found in 47 U.S.C. § 224. As to that portion of the proposed rule, therefore, the "strict test" of *Bell Atlantic* is satisfied.[3] Second, the requirement of nondiscriminatory access to areas owned and controlled by landlords, unlike the forced access orders at issue in *Bell Atlantic*, will not "necessarily constitute a taking." As I concluded above, whether the requirement will be judged under the *Loretto* standard or the competing standards applied in *Heart of Atlanta Motel* or *Nollan* is a close question. In *Loretto* the Court rejected the suggestion that the installation of cable equipment was not a per se taking because the property owner retained the right to cease renting his property to tenants and thereby to avoid the requirement. It explained that "a landlord's ability to rent his property may not be

[3] Because 47 U.S.C. § 224(f)(1) requires a carrier to provide access to ducts and conduits "owned or controlled" by it, Congress clearly contemplated that the FCC would regulate property that is merely controlled by a carrier and therefore owned by a third party. Thus, even if the proposed regulations based upon § 224 necessarily effect a taking without just compensation to property owners in every case, Congress in § 224 has expressly granted the FCC the power to effect such takings and has concomitantly authorized the expenditures needed to satisfy those owners' claims for just compensation.

conditioned on his forfeiting the right to compensation for a physical occupation." *Loretto*, 458 U.S. at 439 n.17. However, the Commission is contemplating regulations that would ensure property owners receive just compensation for any physical occupation of their property. And the Commission has authority to require new entrants into a building to pay just compensation to property owners under 47 U.S.C. §§ 154(i), 303(r), as such regulations are "reasonably ancillary to the effective performance of the Commission's various responsibilities," *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). In particular, the statute requires the Commission to foster competition in local telecommunications markets. On *Bell Atlantic*'s reasoning, therefore, a reviewing court should grant *Chevron* deference to the Commission's interpretation of its authority under the statute.

As Professors Baumol and Merrill explained in assessing whether provisions of the Telecommunications Act of 1996 effect an unconstitutional taking: "[A]s long as the Act includes mechanisms which can provide just compensation for any taking claims found to have merit, these claims, too, should provide no basis to halt the implementation of the Act in the manner deemed most appropriate by regulators to achieve its purpose." William J. Baumol & Thomas W. Merrill, *Deregulatory Takings, Breach of the Regulatory Contract, and the Telecommunications Act of 1996*, 72 N.Y.U. L. REV. 1037, 1056 (1997).

* * *

In the final analysis, I conclude that the nondiscriminatory access proposals are constitutionally sound and that the FCC has the statutory authority to promulgate them. Thank you.

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UNITED STATES SUPREME COURT — Washington, D.C.

Law Clerk - HON. SANDRA DAY O'CONNOR.

UNITED STATES COURT OF APPEALS, D.C. CIRCUIT — Washington, D.C.

Law Clerk - HON. LAURENCE H. SILBERMAN.

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PUBLICATIONS

JUDICIAL AUTHORITY AND SEPARATION OF POWERS:
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